IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 4610 OF 1998.

FDC Limited, a company incorporated under the Indian Companies Act, 1913 and having its office at 142-48, S.V.Road, Jogeshwari West, Mumbai 400 102. ... Plaintiffs.

Versus.

M/s.Onyx Laboratories, a firm carrying on business at Mitra Para, Panihati, 24, Parganas (N) West Bengal. ... Defendants.

Shri Dilip Rai i/by M/s.Bharat Shah & Co. for the Plaintiffs.

None for the Defendants.

CORAM : ABHAY S.OKA, J.

DATED : 2nd August, 2007.

ORAL JUDGMENT.:

1. This suit is listed under the caption "Undefended suits for exparte decree". The learned Counsel appearing for the Plaintiffs has tendered on record an affidavit of one Ms.Brinda Thakur, Constituted Attorney of the Plaintiffs. The said affidavit is taken on record and marked "X" for identification.

2. The Plaintiffs are a public limited company. The Plaintiffs are manufacturers of medicinal and pharmaceutical preparations and formulations. In September 1968 the Plaintiffs invented a trade mark "Electral" in respect of medicinal and pharmaceutical preparations. The said pharmaceutical preparation is an

oral formulation of physiologically important electrolytes in granular carbohydrate base.

3. The Plaintiffs are registered proprietors of two trade marks under which they are manufacturing and selling the aforesaid preparations, namely (i) ELECTRAL (word per se) registered under No.251636B in Class 5 as of 12th September 1968; and (ii) ELECTRAL label registered under No.356663 in Class 5 as of 19th December 1979. It is stated in the plaint that the registration of the aforesaid trade marks have been renewed from time to time.

4. It is stated that the Plaintiffs have been manufacturing and marketing the said preparations under the registered trade mark ELECTRAL and ELECTRAL label/sachet bearing distinctive colour scheme, design and get up. The Plaintiffs have been selling their preparations in sachet bearing distinctive get up, design and colour scheme in white, green and black colours. It is stated that by virtue of extensive sale and advertisement, the Plaintiffs' said preparation under the said registered trade mark have become associated exclusively with the goods of the Plaintiffs and the members of the public and the trade distinguish, recognise and purchase the Plaintiffs' preparation by their trade mark and distinctive get up, design and

colour scheme of sachet in which it is sold.

5. It is stated that the sachet represents original artistic work in respect of which the Plaintiffs are entitled to a subsisting copyright. It is stated that the said sachet is registered under the Copyright Act, 1957. It is stated in the plaint that the said preparation being a non-scheduled drug is purchased by literate and illiterate persons including women and children demanding the same from Chemists across the counter. It is stated that the Plaintiffs have sold the preparation wroth crores of rupees under the aforesaid registered trade mark. They have advertised the preparation on large and extensive scale.

6. In November 1995, the Plaintiffs came across the Defendants' preparation bearing Trade Mark ELECTROCARE-A in the sachet having identical colour scheme, get up and design as that of their ELECTRAL sachet. By letter dated 23rd November 1995, the Plaintiffs called upon the Defendants to stop manufacturing and marketing their product under the trade mark ELECTROCARE-A. The Defendants by their Trade Mark Attorneys' letter dated 28th December 1995 replied to the said notice interalia alleging that their application for registration of the trade mark is pending with the Trade Mark Registry. It is contended that their trade mark is different from

that the Plaintiffs' Electral sachet. Another notice was sent by the Plaintiffs on 18th October 1996 by which the Defendants were called upon to desist from using the impugned trade mark. The Plaintiffs thereafter did not find the Defendants' product in the market. However, the Defendants re-launched their medicinal preparation under the trade mark ELECTROCARE-A.

7. The Plaintiffs addressed a letter dated 18th October 1996 to the Defendants. By a further letter dated 27th July 1998 the Plaintiffs called upon the Defendants to desist from using the said trade mark and the impugned sachet bearing trade mark ELECTROCARE-A. The said letter was replied by the Defendants' Trade Mark Attorneys on 11th August 1998. Reliance was placed by them on the pending application for registration of the mark ELECTROCARE-A and its sachet. It was alleged that the colour scheme, get up and trade mark of the product of the Defendants are completely different.

8. The suit is filed on the ground that the Defendants have adopted and used the trade mark ELECTROCARE-A which is deceptively similar to the trade mark ELECTRAL of the Plaintiffs in respect of the same goods for which the Plaintiffs hold registration. By using the impugned trade mark and the impugned sachet, the Defendants are infringing the Plaintiffs' registered

trade mark. It is alleged that the sachet/packet in which the Defendants are selling their medicinal preparation is deceptively similar and colourable imitation of the Plaintiffs' sachet in colour scheme, design, and get up. It is alleged that the impugned sachet is deceptively similar to the Plaintiffs' Electral sachet and by using the impugned sachet, the Defendants have infringed the Plaintiffs' trade mark under Nos.251636B and 356663. It is alleged that the Defendants use of the impugned trade mark and impugned sachet is dishonest and it is done in order to trade upon the goodwill and reputation of the Plaintiffs and to pass of and enable others to pass of their medicinal preparation as the preparation of the Plaintiffs or in some way connected with the Plaintiffs. It is alleged that the Defendants have copied the Plaintiffs' artistic work.

9. I have perused the averments made in the plaint and the documents annexed to the affidavit of evidence. The documents at Exh.P-4 to P-7 show that the Plaintiffs have obtained registration of the trade mark and the said registration has been renewed. The documnt at Exhibit P-9 proves the registration of the copyright. The Exhibit P-10 contains particulars of sales and promotional expenses from the year 1972-73 to the year

2004-2005. I have perused the Plaintiffs' sachet bearing the trade mark ELECTRAL. I have also perused the Defendants' sachet of ELECTROCARE-A (Exh.P-12). I have also perused copies of the correspondence annexed to the affidavit of evidence. The documents annexed to the affidavit of evidence show that the sachet/packet in which the Defendants are selling their medicinal preparation is deceptively similar and colourable imitation of the Plaintiffs' sachet/packet in the colour scheme, design and get up including the circles on the sachet which are 12 in number.

10. There is no contest by the Defendants and what is stated in the affidavit of evidence as gone unchallenged. There is no reason why the case made out by the Plaintiffs should not be accepted. By prayer clause (e) the Plaintiffs have prayed for a decree in the sum of Rs.5 lakhs as and by way of damages for infringement of trade mark and/or copy right and/or passing of. However, there is no evidence led by the Plaintiffs to pass such a decree. In the alternative in the same prayer, the Plaintiffs have prayed that the Defendants be directed to render to the Plaintiffs true and faithful account of all the profits earned by the Defendants by use of the impugned trade mark and sachet and the Defendants be further ordered to pay to the

Plaintiffs the amount due on such account being taken. The prayer made in the alternative deserves to be granted.

11. Hence the suit is decreed in terms of prayer clauses (a) to (f) and (l) with clarification that the decree in terms of prayer clause (e) is passed except for the bracketed portion. The portion of prayer which is bracketed is not granted.

12. Certified copy is expedited.

Judge.